

1 HONORABLE BARBARA J. ROTHSTEIN  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 DAVITA INC.,  
11 Plaintiff,

12 v.  
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14 VIRGINIA MASON MEMORIAL  
15 HOSPITAL, f/k/a YAKIMA VALLEY  
16 MEMORIAL HOSPITAL and YAKIMA  
17 VALLEY MEMORIAL HOSPITAL  
18 EMPLOYEE HEALTH CARE PLAN

19 Defendants.

20 No. 2:19-cv-302-BJR

21 **AGREEMENT REGARDING  
22 DISCOVERY OF  
23 ELECTRONICALLY STORED  
24 INFORMATION AND ORDER**

25 The parties hereby stipulate to the following provisions regarding the discovery  
26 of electronically stored information (“ESI”) in this matter:

27 **A. General Principles**

28 1. An attorney’s zealous representation of a client is not compromised by conducting  
29 discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate  
30 in facilitating and reasonably limiting discovery requests and responses raises litigation costs and  
31 contributes to the risk of sanctions.

32 2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be  
33 applied in each case when formulating a discovery plan. To further the application of the  
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1 proportionality standard in discovery, requests for production of ESI and related responses should  
2 be reasonably targeted, clear, and as specific as possible.

3 **B. ESI Disclosures**

4 On or before the earlier of (1) 14 days after the Court's decision on the Defendants' motion  
5 to dismiss or (2) July 12, 2019, each party shall disclose:

6 1. Custodians. The five custodians most likely to have discoverable ESI in their  
7 possession, custody or control. The custodians shall be identified by name, title, connection to the  
8 instant litigation, and the type of the information under his/her control.

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10 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g. shared  
11 drives, servers, etc.), if any, likely to contain discoverable ESI.

12 Party-owned or controlled storage locations including servers, cloud-based  
13 servers, comprehensive mail storage systems, or web-accessible email services.

14 **C. Preservation of ESI**

15 The parties acknowledge that they have a common law obligation to take reasonable and  
16 proportional steps to preserve discoverable information in the party's possession, custody or  
17 control. With respect to preservation of ESI, the parties agree as follows:

18 1. Absent a showing of good cause by the requesting party, the parties shall not  
19 be required to modify the procedures used by them in the ordinary course of business to back-  
20 up and archive data; provided, however, that the parties shall preserve all discoverable ESI in  
21 their possession, custody or control.

22  
23 2. All parties shall supplement their disclosures in accordance with Rule 26(e)  
24 with discoverable ESI responsive to a particular discovery request or mandatory disclosure  
25 where that data is created after a disclosure or response is made (unless excluded under (C)(3)

1 or (D)(1)-(2) below).

2       3.     Absent a showing of good cause by the requesting party, the following  
3 categories of ESI need not be preserved:  
4           a.     Deleted, slack, fragmented, or other data only accessible by forensics.  
5           b.     Random access memory (RAM), temporary files, or other ephemeral  
6 data that are difficult to preserve without disabling the operating system.  
7           c.     On-line access data such as temporary internet files, history, cache,  
8 cookies, and the like.  
9           d.     Data in metadata fields that are frequently updated automatically, such as  
10 last-opened dates (see also Section (E)(5)).  
11           e.     Back-up data that are substantially duplicative of data that are more  
12 accessible elsewhere.  
13           f.     Server, system or network logs.  
14           g.     Data remaining from systems no longer in use that is unintelligible on the  
15 systems in use.  
16           h.     Electronic data (e.g. email, calendars, contact data, and notes) sent to or  
17 from mobile devices (e.g., iPhone, iPad, Android, and Blackberry devices), provided that a copy  
18 of all such electronic data is routinely saved elsewhere (such as on a server, laptop, desktop  
19 computer, or “cloud” storage).

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21       **D. Privilege**

22       1.     With respect to privileged or work-product information generated after the filing  
23 of the complaint, parties are not required to include any such information in privilege logs.  
24       2.     Activities undertaken in compliance with the duty to preserve information are

1 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

2       3. Information produced in discovery that is protected as privileged or work product  
3 shall be immediately returned to the producing party, and its production shall not constitute a  
4 waiver of such protection, if: (i) such information appears on its face to have been inadvertently  
5 produced or (ii) the producing party provides notice within 15 days of discovery by the  
6 producing party of the inadvertent production.

7       4. Privilege Log Based on Metadata. The parties agree that privilege logs shall  
8 include a unique identification number for each document and the basis for the claim (attorney-  
9 client privileged or work-product protection). For ESI, the privilege log may be generated using  
10 available metadata, including author/recipient or to/from/cc/bcc names; the subject matter or title  
11 and date created. Should the available metadata provide insufficient information for the purpose  
12 of evaluating the privilege claim asserted, the producing party shall include such additional  
13 information as required by the Federal Rules of Civil Procedure.

#### 14           **E. ESI Discovery Procedures**

15       1. On-site inspection of electronic media. Such an inspection shall not be permitted  
16 absent a demonstration by the requesting party of specific need and good cause or by agreement  
17 of the parties.

18       2. Search methodology. The parties shall timely attempt to reach agreement on  
19 appropriate search terms, or an appropriate computer- or technology-aided methodology, before  
20 any such effort is undertaken. The party seeking the electronic discovery shall first suggest  
21 appropriate search terms. The parties shall continue to cooperate in revising the appropriateness  
22 of the search terms or computer- or technology-aided methodology.

23 In the absence of agreement on appropriate search terms, or an appropriate computer- or  
24 technology-aided methodology, the following procedures shall apply:

25           a. A producing party shall disclose the search terms or queries, if any, and  
26 methodology that it proposes to use to locate ESI likely to contain discoverable information. The

1 parties shall meet and confer to attempt to reach an agreement on the producing party's search  
2 terms and/or other methodology.

3           b. If search terms or queries are used to locate ESI likely to contain  
4 discoverable information, a requesting party is entitled to no more than 5 additional terms or  
5 queries to be used in connection with further electronic searches absent a showing of good cause  
6 or agreement of the parties. The 5 additional terms or queries, if any, must be provided by the  
7 requesting party within 14 days of receipt of the producing party's production.

8           c. Focused terms and queries should be employed; broad terms or queries,  
9 such as product and company names, generally should be avoided. Absent a showing of good  
10 cause, each search term or query returning more than 250 megabytes of data is presumed to be  
11 overbroad, excluding Microsoft PowerPoint files, image and audio files, and similarly large file  
12 types.

13           d. The producing party shall search both non-custodial data sources and ESI  
14 maintained by the custodians identified above.

15           3. Format. The parties agree that ESI will be produced to the requesting party with  
16 searchable text, in a format to be decided between the parties. Acceptable formats include, but are  
17 not limited to, native files, multi-page TIFFs (with a companion OCR or extracted text file),  
18 single-page TIFFs (only with load files for e-discovery software that includes metadata fields  
19 identifying natural document breaks and also includes companion OCR and/or extracted text  
20 files), and searchable PDF. Unless otherwise agreed to by the parties, files that are not easily  
21 converted to image format, such as spreadsheet, database and drawing files, should be produced  
22 in native format.

23           a. Each document image file shall be named with a unique Bates Number (e.g.  
24 the unique Bates Number of the page of the document in question, followed by its file extension).  
25 File names should not be more than twenty characters long or contain spaces. When a text-  
26 searchable image file is produced, the producing party must preserve the integrity of the

1 underlying ESI, i.e., the original formatting, the metadata (as noted below) and, where applicable,  
2 the revision history.

3                 b.         If appropriate to the particular case, the parties shall consider whether or  
4 not the full text of each electronic document shall be extracted ("Extracted Text") and produced  
5 in a text file. If the parties so agree, the Extracted Text shall be provided in searchable ASCII text  
6 format (or Unicode text format if the text is in a foreign language) and shall be named with a  
7 unique Bates Number (e.g. the unique Bates Number of the first page of the corresponding  
8 production version of the document followed by its file extension).

9                 c.         If a document is more than one page, the unitization of the document and  
10 any attachments and/or affixed notes shall be maintained as they existed in the original  
11 document.

12                 4.         De-duplication.     The parties may de-duplicate their ESI production across  
13 custodial and non-custodial data sources after disclosure to the requesting party.

14                 5.         Metadata fields. If the requesting party seeks metadata, the parties agree that only  
15 the following metadata fields need be produced: document type; custodian and duplicate  
16 custodians; author/from; recipient/to, cc and bcc; title/subject; file name and size; original file  
17 path; date and time created, sent, modified and/or received. Although it is presumed generally  
18 that the above list of metadata fields will be provided, the list of metadata fields is intended to  
19 be flexible and may be changed by agreement of the parties, particularly in light of advances and  
20 changes in technology, vendor and business practices.

21                 6.         Hard-Copy Documents. If the parties elect to produce hard-copy documents in an  
22 electronic format, the production of hard-copy documents shall include a cross-reference file that  
23 indicates document breaks and sets forth the Custodian or Source associated with each produced  
24 document. Hard-copy documents shall be scanned using Optical Character Recognition  
25 technology and searchable ASCII text files shall be produced (or Unicode text format if the text  
26 is in a foreign language), unless the producing party can show that the cost would outweigh the

1 usefulness of scanning (for example, when the condition of the paper is not conducive to scanning  
2 and will not result in accurate or reasonably useable/searchable ESI). Each file shall be named  
3 with a unique Bates Number (e.g. the Unique Bates Number of the first page of the corresponding  
4 production version of the document followed by its file extension).

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6 DATED this 17th day of June, 2019.

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24 Memorial Hospital Employee Health Care  
25 Plan

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**ORDER**

2 THIS MATTER came before the Court on the Parties' Stipulated **MODEL**  
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**AGREEMENT REGARDING DISCOVERY OF ELECTRONICALLY STORED**  
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**INFORMATION.** The Court has considered the Agreement and it is HEREBY ORDERED that  
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the Agreement is approved and the form of Order entered.

7 DATED this 21st day of June, 2019.

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Barbara Jacobs Rothstein  
U.S. District Court Judge